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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

16 IMPOSSIBLE FOODS INC., a Delaware
17 corporation,

18 Plaintiff/Counter-Defendant,

19 v.

20 IMPOSSIBLE LLC, a Texas limited liability
21 company, and JOEL RUNYON,

22 Defendants/Counter-Plaintiffs.

Case No. 5:21-cv-02419-BLF (SVK)

**PLAINTIFF/COUNTER-DEFENDANT'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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Judge: Hon. Beth Labson Freeman
Date: October 23, 2025
Time: 9:00 a.m.

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1 **I. INTRODUCTION**

2 Defendants' trademark infringement counterclaims will fail at trial and Defendants' 3 trademark registrations will be cancelled because they have committed fraud on the United 4 States Patent & Trademark Office (the "PTO") for at least seven years (and counting). Even 5 Judge van Keulen found by a preponderance of the evidence that Defendant Joel Runyon 6 engaged in fraud. To avoid having to explain their fraudulent conduct in court, Defendants seek 7 summary judgment on Impossible Foods's fraud claims. But Defendants' motion fails. 8 Impossible Foods has standing to pursue its fraud claims because the Lanham Act requires only 9 a minimal showing of an "interest" beyond that of a member of the general public—which 10 Impossible Foods undoubtedly has here. And Defendants' post hoc amendment of *some* of their 11 registrations does not moot their fraud, either in whole or in part.

12 Defendants also seek summary judgment on Impossible Foods's trademark claims on 13 likelihood of confusion grounds. Yet the Ninth Circuit has repeatedly warned that courts should 14 avoid summary judgment on likelihood of confusion, because it involves a fact-intensive multi- 15 factor analysis. And a multitude of material facts relevant to that analysis are in dispute. When 16 the record is viewed in the light most favorable to Impossible Foods, as required at this stage, 17 at least *five* of the likelihood-of-confusion factors weigh heavily in Impossible Foods's favor, 18 with the other three either weighing slightly in Impossible Foods's favor or neutral. Summary 19 judgment cannot be granted under these circumstances—nor can it be granted on Impossible 20 Foods's common law unfair competition claim, which follows the Lanham Act claim exactly.

21 Finally, Defendants' motion as to Impossible Foods's trademark abandonment claim 22 fails because Impossible LLC failed to use in commerce its IMPOSSIBLE FITNESS marks 23 and IMPOSSIBLE motion mark for many years, creating a presumption of abandonment that 24 Defendants fail to rebut as a matter of law. For these reasons, Defendants' motion should be 25 denied in its entirety.

26 **II. BACKGROUND**

27 Defendants have attempted to present this case as a story of David versus Goliath—of 28 entrepreneurial grit versus big corporation. But the record reveals a very different story: Joel
PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
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1 Runyon's years-long scheme to defraud the PTO and obtain exclusive trademark rights for
2 products Mr. Runyon never sold, only to wield those fraudulently obtained rights against
3 Impossible Foods and then scramble to cover up his deception only after being caught.

4 Over many years, Mr. Runyon submitted sworn Statements of Use (the "Statements") and
5 a sworn Section 15 Declaration to the PTO for his portfolio of IMPOSSIBLE-formative marks,
6 each time attesting that the marks were "currently" or "continuously" being used in connection
7 with a broad array of products. But in each instance—as he was finally forced to admit under
8 oath—Mr. Runyon was lying, as his company had *never even made* most of those products.

9 **A. The First Signs of Mr. Runyon's Fraud: IMPOSSIBLE NUTRITION**

10 The first hint that Mr. Runyon was engaged in a years-long scheme to defraud the PTO
11 came in July 2024, about two months after Impossible LLC asserted trademark infringement
12 claims against Impossible Foods. Dkt. No. 80 at 27. A year prior, the PTO had reminded
13 Impossible LLC that it could file a Section 15 Declaration attesting that its IMPOSSIBLE
14 NUTRITION design mark had "been **continuously** used in commerce for five (5) consecutive
15 years after the date of registration" for the goods listed in the registration, and that the mark
16 was not being challenged in any ongoing proceeding. Declaration of H. Forrest Flemming, III
17 ("Flemming Decl.") Ex. M (emphasis added). By law, the filing of a Section 15 Declaration
18 renders a mark "incontestable." *See* 5 J. Thomas McCarthy, *McCarthy on Trademarks and*
19 *Unfair Competition* (hereinafter, "*McCarthy*") § 32:141 (5th ed.).

20 By July 2024, Impossible LLC had not filed a Section 15 Declaration. *See* Dkt. No.
21 138-1. On July 3, 2024, Impossible Foods sought Impossible LLC's consent for Impossible
22 Foods to amend its complaint to assert a claim that Impossible LLC had abandoned several of
23 its marks, including the IMPOSSIBLE NUTRITION design mark. Dkt. No. 93-2 at 4.
24 Impossible Foods had been unable to find any evidence that Impossible LLC was actually
25 using that design mark in commerce. *Id.*

26 The problem for Impossible LLC was that to file a Section 15 Declaration and obtain
27 incontestability status, the registration could not be subject to challenge in any ongoing
28 proceeding. Thus, if Impossible Foods were to file its motion to amend, Impossible LLC would

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1 not be able to file a Section 15 Declaration and achieve incontestability.

2 So, instead of responding to Impossible Foods's July 3 request, Impossible LLC quickly
3 put together and filed a Section 15 Declaration on July 12 in which Mr. Runyon swore to the
4 PTO that (a) the registration was not being challenged in any proceeding; and (b) the mark had
5 been in continuous use for five years. *Id.*; Dkt. No. 138-1. At the time, Impossible Foods was
6 unaware of any evidence that Impossible LLC had actually been using the IMPOSSIBLE
7 NUTRITION design mark continuously for five years, so Impossible Foods advised the Court
8 on July 23, 2024, that it was seeking discovery in advance of potentially asserting a claim for
9 fraud on the PTO. Dkt. No. 93-2 at 6–7.

10 Discovery proved that Mr. Runyon was lying to the PTO in his Section 15 Declaration.
11 Impossible LLC had *not* been using the IMPOSSIBLE NUTRITION design mark continuously
12 for five years in connection with the goods in the registration: i.e., "nutritional supplements."
13 Impossible LLC had previously used the mark only in connection with bottled krill oil pills.
14 Dkt. No. 138-2. [REDACTED]

15 [REDACTED] . Flemming Decl. Ex. N.
16 And by October 17, 2021, products bearing the IMPOSSIBLE NUTRITION design mark were
17 no longer listed for sale on Impossible LLC's websites. Dkt. No. 138-7 at 2. True, Impossible
18 LLC later launched its Impossible Sleep and Impossible Energy supplements, but neither those
19 two products, nor their packaging, nor the websites selling them used the IMPOSSIBLE
20 NUTRITION design mark. *See* Dkt. Nos. 138-3; 138-4; 138-7 at 10, 14–24. Rather, in January
21 2024—and apparently in response to the PTO's reminder—Impossible LLC added the design
22 mark back to its website and submitted a screenshot of it with Mr. Runyon's false Section 15
23 Declaration. Dkt. No. 138-1; *compare* Dkt. No. 138-7 at 22–24 (archival capture of
24 impossible.co/collections/nutrition from December 1, 2023) *with* Dkt. No. 151-14 (archival
25 capture of impossible.co/collections/nutrition from January 27, 2024).

26 **B. More Signs of Mr. Runyon's Fraud: the PTO's Random Audit**

27 Ultimately, Mr. Runyon's fraud on the PTO extends to at least *five* trademark
28 registrations that Impossible LLC is asserting against Impossible Foods. One of those
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1 registrations is the IMPOSSIBLE word mark. On February 3, 2024, the PTO notified
2 Impossible LLC that its IMPOSSIBLE word mark registration (Reg. No. 5620625) had been
3 “randomly selected . . . for audit to determine whether the mark is in use with all of the goods
4 and/or services identified in the affidavit or declaration of use.” Dkt. No. 138-9 (emphasis
5 added). At the time, the registration covered the following apparel goods in Class 25: “t-shirts,
6 sweatshirts, pants, shorts, tank tops, yoga pants, tights and underwear.” Flemming Decl. Ex. O.
7 This is because Mr. Runyon had submitted a sworn Statement of Use to the PTO on January
8 15, 2018, stating that the mark was currently in use in connection with *all* those goods, and the
9 PTO had accepted that sworn statement in issuing the registration. *Id.* at 6; Dkt. No. 262-26 at
10 2.

11 The PTO gave Impossible LLC until December 4, 2024, to provide proof of use in
12 connection with all the goods covered by the registration. Dkt. No. 138-9 at 5. But on that day,
13 rather than prove such use, Impossible LLC—with no explanation—deleted “sweatshirts,
14 pants, shorts, yoga pants, tights and underwear” from the registration, leaving only “t-shirts”
15 and “tank tops.” Dkt. No. 138-10.

16 Impossible Foods was confused. Seven months earlier, on March 8, 2024, Impossible
17 LLC had asserted trademark claims against Impossible Foods, citing the IMPOSSIBLE word
18 mark registration and explicitly claiming rights in “t-shirts, sweatshirts, pants, shorts, tank tops,
19 yoga pants, tights and underwear.” Dkt. No. 80 at 21 ¶ 36. But now, Impossible LLC was
20 deleting most of those goods from one of its registrations.

21 Impossible Foods investigated, and it uncovered no evidence that Impossible LLC had
22 ever offered sweatshirts, pants, shorts, yoga pants, tights, or underwear. Flemming Decl. ¶ 2.
23 Yet Impossible LLC had asserted at least *four* registrations against Impossible Foods covering
24 those goods. *See* Dkt. No. 80 at 21 ¶ 36.

25 Accordingly, on January 31, 2025, Impossible Foods sought leave to amend its
26 complaint to assert a claim for fraud on the PTO, apprising the Court of the IMPOSSIBLE
27 NUTRITION design mark Section 15 Declaration, and of the registrations covering apparel
28 goods for which no use appeared to exist. Dkt. No. 139-1 at 2–5.

1 **C. Discovery Unveils the Extent of Mr. Runyon’s Fraud on the PTO**

2 Defendants completed their document production and served their interrogatory
3 responses before Mr. Runyon sat for his combined individual and 30(b)(6) deposition on April
4 10, 2025. Flemming Decl. Ex. A. By that date, it had become obvious to Impossible Foods that
5 Impossible LLC had never offered many of the apparel goods covered by at least four of its
6 asserted registrations, and that Impossible LLC had not used its IMPOSSIBLE NUTRITION
7 design mark continuously for five years. Flemming Decl. ¶ 3. It appeared, therefore, that Mr.
8 Runyon had lied to the PTO in numerous sworn statements submitted in connection with at
9 least five registrations between 2018 and 2024.

10 At his deposition, Mr. Runyon was forced to confirm that his company had never
11 offered sweatshirts, pants, shorts, yoga pants, tights, or underwear, despite repeatedly swearing
12 the opposite to the PTO in order to acquire broad, exclusive trademark rights. Flemming Decl.
13 Ex. B (Runyon Apr. 10 Dep.) at 131:2–3; 133:11–16; 133:18–134:4; 166:17–169:3; 201:4–
14 202:8; *see also id.* at 179:12–181:21; 184:2–190:9; 191:18–194:20 (regarding non-use of
15 Defendants’ IMPOSSIBLE NUTRITION design mark in conjunction with a declaration of
16 continuous use). This admission meant that Mr. Runyon had submitted at least five fraudulent,
17 sworn statements to the PTO over a six-year period and had wrongfully acquired rights in at
18 least five trademark registrations, including the Statements and the Section 15 Declaration.

19 **D. Judge Van Keulen Finds That Mr. Runyon Committed Fraud on the PTO**

20 Mr. Runyon admitted during his deposition that he had both sought and relied upon
21 attorney advice in submitting the Statements. Flemming Decl. Ex. B (Runyon Apr. 10 Dep.) at
22 150:11–152:5; 176:21–177:12; 202:9–203:16; 208:7–209:8. Impossible Foods therefore
23 requested the production of any such attorney-client communications pursuant to the crime-
24 fraud exception to the attorney-client privilege. *See* Dkt. No. 176-2.

25 In response, Defendants argued, quite forcefully, that Mr. Runyon simply
26 misunderstood the Statements of Use and that he did not know he was swearing to use on “all”
27 goods. *Id.* Mr. Runyon had testified in his April 10, 2025, deposition that he understood the
28 word “namely” in the Statements to mean “for example,” such that he was not attesting to use

1 on “all” goods following that word. Flemming Decl. Ex. B (Runyon Apr. 10 Dep.) at 161:12–
2 14. That excuse never made sense, as Mr. Runyon’s Statements of Use clearly state that “the
3 mark is in use in commerce on or in connection with all the goods/services in the application.”
4 Flemming Decl. Exs. K, L, O.

5 Ultimately, Judge van Keulen conducted an *in camera* review of the attorney-client
6 communications and found by a preponderance of the evidence that Mr. Runyon had engaged
7 in fraud on the PTO, and she ordered the production of a particular email chain (the “Fraud
8 Emails”). Dkt. No. 240 at 7.

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED] Flemming Decl. Ex. P at 3. [REDACTED]

13 [REDACTED] *Id.* at 4. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED] *Id.*

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] Flemming Decl. Ex. P at 2–3. [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] *Id.* at 2 (emphasis added). [REDACTED]

26 [REDACTED]

27 [REDACTED] *Id.* at 2;

28 Flemming Decl. Exs. K, L.

1 **E. Runyon's Supplemental Deposition**

2 The Fraud Emails showed that Mr. Runyon knew full well that the Statements meant
3 that the marks had to be used in connection with all goods in the applications and
4 registrations—not just “examples.” That is perhaps why, after being ordered to produce the
5 damning Fraud Emails, Defendants refused to produce Mr. Runyon for more than *twenty*
6 *minutes* of additional deposition testimony, forcing Impossible Foods to waste resources by
7 filing a formal motion with the Court. Dkt. No. 246. But rather than defend their position,
8 Defendants gave in and produced Mr. Runyon for a full additional hour. Dkt. No. 253.

9 During his supplemental deposition, Mr. Runyon was confronted with all of his
10 contradictory statements and testimony. [REDACTED]

11 [REDACTED]. Flemming Decl. Ex. D (Runyon Aug.
12 5 Dep.) at 547:14-25; 550:3-8. [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] *Id.* at 542:4-17; 543:7-16; 558:18-
16 559:3. [REDACTED]
17 [REDACTED]
18 [REDACTED] *Id.* at 559:8-565:25; 559:7-12.

19 **F. Defendants' Scramble to Amend Their Registrations**

20 Three months ago, and long after Impossible Foods exposed Mr. Runyon's fraudulent
21 scheme, Impossible LLC filed a Statement of Use in connection with its IMPOSSIBLE
22 FITNESS word mark. Flemming Decl. Ex. J. Mr. Runyon had previously sworn to the PTO
23 that Impossible LLC was using that mark in connection with “t-shirts, sweatshirts, pants,
24 shorts, tank tops, yoga pants, [and] tights.” *Id.* Ex. L. But this May 6, 2025 Statement of Use
25 requested the deletion of “sweatshirts, pants, shorts, yoga pants, tights” from the registration.
26 *Id.* Ex. J at 4. Impossible LLC made a similar filing on April 22, 2025 in connection with the
27 IMPOSSIBLE FITNESS *design* mark, requesting the deletion of “sweatshirts, pants, shorts,
28 yoga pants, tights.” *Id.* Ex. I at 4.

1 Significantly, in both cases, Defendants requested these amendments on the last
2 possible day to do so—i.e., the PTO’s deadline to file a renewed Statement of Use. Flemming
3 Decl. Exs. Q, R. Defendants have not requested the amendment of their other fraudulent
4 registrations, despite Mr. Runyon’s own admission that the registrations should not cover all of
5 the goods listed in them. In the meantime, Defendants have used their ill-gotten trademark
6 rights against Impossible Foods in this Court.

7 **III. ARGUMENT**

8 **A. Impossible Foods’s Fraud Counterclaims Should Proceed**

9 **1. Impossible Foods Has Standing**

10 Impossible LLC begins its attack on Impossible Foods’s fraud on the PTO claims by
11 arguing that 15 U.S.C. § 1119 authorizes cancellation of a trademark registration only where the
12 claimant is also asserting an infringement claim against that same registration. But Impossible
13 LLC’s own cited case holds to the contrary: cancellation under Section 1119 may be “sought if
14 there is already an ongoing action that involves a registered mark.” *Airs Aromatics, LLC v.*
15 *Victoria’s Secret Stores Brand Mgmt*, 744 F.3d 595, 599 (9th Cir. 2014). This action plainly
16 “involve[s]” registered marks—including the fraudulent registrations themselves, which
17 Impossible LLC is asserting against Impossible Foods. Dkt. No. 241 at 63, ¶ 36.

18 A party has standing under Section 1119 as long as he “believes that he is or will be
19 damaged by the registration of [the] mark.” *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 735 F.2d
20 346, 348 (9th Cir. 1984) (quoting 15 U.S.C. § 1064). Such standing “requires only” that the
21 claimant show “a ‘real interest’ in the proceeding.” *Id.* at 349 (citations omitted). This is a very
22 low bar. Even a demand letter from the registrant—and certainly “an assertion of a likelihood of
23 confusion” by either side—will suffice. *See id.*; *see also Blue Bottle Coffee, LLC v. Liao*, No. 21-
24 cv-06083-CRB, 2024 WL 2061259, at *8 (N.D. Cal. May 7, 2024) (“All that is needed is a real
25 interest in the outcome of the proceeding beyond the general public.”). Here, Impossible LLC is
26 wielding its fraudulent registrations in this very action, in an attempt to obtain monetary and
27 injunctive relief against Impossible Foods. Thus, Impossible Foods unquestionably has standing
28 under Section 1119. *See Hokto Kinoko Co. v. Concord Farms, Inc.*, 738 F.3d 1085, 1097 (9th

1 Cir. 2013) (holding that cancellation counterclaim for fraud on the PTO may be brought under 15
2 U.S.C. §§ 1064, 1119).

3 **2. Impossible Foods Is Not Pursuing a Section 1120 Claim**

4 Impossible LLC speculates that “Impossible Foods may attempt to recast its fraud claim
5 as asserted under Section 1120,” which requires proof of damage. Dkt. No. 267 (“Br.”) at 18.
6 Not so. Impossible Foods’s fraud on the PTO claims are brought under Sections 1064 and 1119,
7 which do not require proof of damage. *See Star-Kist*, 735 F.2d at 349 (“[T]here is no requirement
8 that damage be proved in order to establish standing” under Sections 1064 and 1119).

9 **3. Impossible LLC’s Post Hoc Amendments Moot Neither the Fraud
10 Claim nor the Cancellation Remedy**

11 Impossible LLC next contends that because it amended *some* of its fraudulent
12 registrations (at the last possible moment), the fraud claims as to those registrations are moot.
13 Impossible LLC’s sole cited case, *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013), has nothing to
14 do with fraud and merely holds that there is no “case or controversy” when a plaintiff dismisses
15 its infringement claims “with prejudice” *and* issues a “covenant not to sue.” *Id.*

16 Meanwhile, the cases addressing Impossible LLC’s argument uniformly reject it. *See*,
17 *e.g., Sunsauce Foods Indus. Corp. v. Son Fish Sauce USA Corp.*, No. 21-cv-06083-CRB, 2024
18 WL 4933346, at *10 (N.D. Cal. Dec. 2, 2024) (“Overstating the extent of a mark’s use can
19 constitute fraud. Correcting an overstatement is not enough to rectify fraud.” (citation omitted));
20 *One True Vine, LLC v. Wine Grp. LLC*, No. C 09-1328 MHP, 2009 WL 3707512, at *3 (N.D.
21 Cal. Nov. 4, 2009) (“Yet plaintiff cannot nullify a claim that it procured its trademark through
22 fraud on the USPTO by now amending its trademark registration. . . . [A] *post hoc* amendment of
23 the trademark register does not serve to moot or rectify such fraud.”); *G&W Lab’ys, Inc. v. G W*
24 *Pharma Ltd.*, 89 U.S.P.Q.2d 1571, 1573 (T.T.A.B. 2009) (cited by Impossible LLC) (“It is
25 settled that fraud cannot be cured merely by deleting from the registration those goods or
26 services on which the mark was not used at the time of the signing of a use-based application or
27 a Section 8 affidavit.”).

28 Impossible LLC next contends that because it removed the fraudulently obtained goods
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1 from some of its registrations, the Court cannot grant any further relief as to those registrations
2 because fraud can purportedly only result in the cancellation of one class. Br. at 19-20. In so
3 arguing, Impossible LLC improperly conflates “class” with “goods.” In the PTO, similar
4 “goods” are grouped into numbered categories, with each referred to as a “class.” Class 25, for
5 example, includes all types of individual clothing items. *See The North Face Apparel Corp. v.*
6 *Sanyang Indus. Co., LTD*, 116 U.S.P.Q.2d 1217 (T.T.A.B. 2015). Here, Impossible LLC only
7 deleted a few apparel *goods* from *within* Class 25 in the fraudulent registrations it has amended;
8 it did not delete the entirety of Class 25 from the registrations. Thus, there is no dispute that the
9 Court may cancel the entirety of Class 25 in those registrations.

10 Finally, Impossible LLC contends that fraud as to one class of goods cannot result in the
11 cancellation of an entire multi-class registration. That is not the case. The Trademark Trial and
12 Appeal Board has expressly held that “[i]f fraud can be shown in the procurement of a
13 registration, the entire resulting registration is void.” *Medinol Ltd. v. Neuro Vasx, Inc.*, 67
14 U.S.P.Q.2d 1205, 1208 (T.T.A.B. 2003) (emphasis added). In a subsequent decision, the Board
15 held that “judgment on the ground of fraud as to one class *does not in itself require* cancellation
16 of *all* classes in a registration.” *G&W Lab’ys, Inc.*, 89 U.S.P.Q.2d at 1574 (emphasis added). But,
17 *G&W* merely gives the Court flexibility as to how much of the registration should be cancelled in
18 the event of fraud. [REDACTED]

19 [REDACTED]

20 [REDACTED] Flemming Decl. Ex. P at 2 (emphasis added).

21 Even if it were binding on this Court, *G&W* would not *preclude* the Court as a matter of
22 law from cancelling the registrations in their entireties. But as an agency decision, *G&W* is not
23 binding on this Court. Moreover, a “trademark cancellation claim is equitable in nature,”
24 meaning the Court, not the jury, will decide whether and to what extent Impossible LLC’s must
25 be cancelled for fraud. *Amarte USA Holdings, Inc. v. Kendo Holdings Inc.*, No. 22-cv-08958-
26 CRB, 2024 WL 4093910, at *13 (N.D. Cal. Sept. 4, 2024). The Court should not tie its own
27 hands at summary judgment when, after trial reveals the totality of the circumstances, the Court
28 may wish to exercise its equitable discretion to cancel one or more of Impossible LLC’s marks in

1 their entireties based on the nature and scope of Mr. Runyon's fraud.

2 Further, the reasoning in *G&W* does not fit the facts of this case. In *G&W*, the Board
3 explained that because a registrant *could* file separate applications for each class, the possibility
4 of fraud voiding the entire registration "would simply provide an incentive against the filing of
5 multiple-class registrations." 89 U.S.P.Q.2d at 1574 n.3. The Board also noted that as "a general
6 matter, the filer of such [a multiple-class registration] is in the same position it would be had it
7 filed several single-class applications instead." *Id.* at 1574.

8 Here, however, Mr. Runyon submitted a *single* fraudulent Statement of Use to the PTO
9 per registration containing a *single* fraudulent statement: "the mark is in use in commerce on or
10 in connection with all the goods/services in the application." Flemming Decl. Exs. K, L. O.
11 Parsing Mr. Runyon's single fraudulent statement according to the PTO's internal "class" system
12 as if he himself had parsed the Statements by class makes little sense. In short, even if Mr.
13 Runyon's fraudulent statement "does not in itself *require*" cancellation of the entire registration,
14 this Court could well exercise its equitable discretion to do so. And, as such, summary judgment
15 is improper on this issue.

16 **B. Likelihood of Confusion Cannot Be Decided on Summary Judgment Here**

17 Defendants move for summary judgment on likelihood of confusion. But "[w]hile the
18 district court must apply the correct [summary judgment] standard in any case, the necessity to
19 do so is heightened in cases turning on the likelihood of consumer confusion. Because the
20 determination is based on a non-exhaustive, multi-factor, fact-intensive inquiry, we have
21 cautioned against granting summary judgment in these cases." *JL Bev. Co., LLC v. Jim Beam*
22 *Brands Co.*, 828 F.3d 1098, 1105 (9th Cir. 2016). In other words, "district courts should grant
23 summary judgment motions regarding the likelihood of confusion sparingly, as careful
24 assessment of the pertinent factors that go into determining likelihood of confusion usually
25 requires a full record" developed at trial. *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190,
26 1210 (9th Cir. 2012).

27 Defendants also place outsized importance on the "relatedness of the goods" *Sleekcraft*
28 factor, treating it as dispositive. This is error. "The presence or absence of a particular factor

1 does not necessarily drive the determination of a likelihood of confusion.” *Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1161–63 (9th Cir. 2021). The Ninth Circuit has “never countenanced a likelihood of confusion determination based on . . . the consideration of any single factor.” *See Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 632 (9th Cir. 2008). In fact, the Ninth Circuit’s pattern jury instructions provide: “You should not focus on any one factor to resolve whether there was a likelihood of confusion, because you must consider all relevant evidence.” 9th Cir. Model Civ. Jury Instr. § 15.18 (2017 ed.).

8 As shown below, at least five of the *Sleekcraft* factors weigh strongly in Impossible Foods’s favor, with the other three either weighing in Impossible Foods’s favor or neutral. In 9 such circumstances, summary judgment against Impossible Foods cannot be granted. 10

11 **1. Impossible Foods’s IMPOSSIBLE Mark Is Strong**

12 In their brief, Defendants take the position that the first *Sleekcraft* factor “does not even 13 merit attention” from the Court. Br. at 11. To the contrary, the strength of the mark factor is 14 relevant because the greater the strength of a mark, “the greater protection the mark is accorded 15 by trademark laws.” *Yuga Labs, Inc. v. Ripps*, 144 F.4th 1137, 1168 (9th Cir. 2025). In other 16 words, a strong showing on the first *Sleekcraft* factor means lesser showings may be required 17 on the remaining factors, and vice versa. *See Perfumebay.com Inc. v. eBay, Inc.*, 506 F.3d 1165, 1174 (9th Cir. 2007).

18 A mark’s strength is evaluated in terms of its conceptual strength and commercial 19 strength. A mark’s conceptual strength depends largely on the obviousness of its 20 connection to the good or service to which it refers. To determine a mark’s 21 conceptual strength, we classify a mark along a spectrum of five categories ranging 22 from strongest to weakest: arbitrary, fanciful, suggestive, descriptive, and generic. 23 Arbitrary and fanciful marks, which employ words and phrases with no commonly 24 understood connection to the product, are the two strongest categories, and trigger 25 the highest degree of trademark protection.

26 *JL Bev. Co.*, 828 F.3d at 1106–07 (internal citations omitted).

27 A reasonable jury could conclude that Impossible Foods’s mark is “arbitrary” 28 because—as applied to the Impossible Foods products at issue, i.e., plant-based meat products—the word “impossible” does not describe and arguably does not suggest any specific qualities of those specific products. *See id.* As to commercial strength (and again, solely

1 considering the products in question, plant-based meat products) Impossible Foods has
2 exclusively used its IMPOSSIBLE mark since 2016 in connection with those specific products.
3 [REDACTED]

4 [REDACTED] Flemming Decl. Ex. F at 9. [REDACTED]

5 [REDACTED] *Id.* at 8.

6 Accordingly, Impossible Foods's mark is both conceptually and commercially strong
7 and must be "afforded the widest ambit of protection from infringing uses." *Interstellar*
8 *Starship Servs., Ltd. v. Epix Inc.*, 184 F.3d 1107, 1111 (9th Cir. 1999). This factor weighs
9 heavily in Impossible Foods's favor.

10 **2. Defendants Concede That the Marks Are Similar**

11 The second *Sleekcraft* factor, the similarity of the parties' marks, "has always been
12 considered a critical question in the likelihood-of-confusion analysis." *JL Bev. Co.*, 828 F.3d at
13 1109. Yet Defendants do not mention this factor at all, despite bearing the burden of proving
14 the absence of a genuine dispute on it. *See* Br. at 6–11.

15 Defendants therefore concede that a reasonable factfinder could conclude that the
16 parties' marks—each "IMPOSSIBLE," displayed in all capital letters—are similar. This factor
17 therefore also weighs heavily in Impossible Foods's favor.

18 **3. The Parties' Products Are Not Identical; They Are Related**

19 Defendants make much of Impossible Foods's 30(b)(6) testimony that "nutritional
20 supplements are not the same types of products as plant-based meat products." But "the law
21 does not demand complete identity of goods, as defendants seem to contend." *His & Her Corp.*
22 *v. Shake-N-Go Fashion Inc.*, No. 2:11-cv-05323-CAS(VBKx), 2015 WL 13604255, at *7
23 (C.D. Cal. Apr. 6, 2015). Under the third *Sleekcraft* factor, "[t]he concept of relatedness . . . is
24 not so narrow. It does not mean that customers would necessarily consider the products as
25 interchangeable." *Nimbus Data Sys., Inc. v. Nimble Storage, Inc.*, No. 2:11-cv-05323-
26 CAS(VBKx), 2011 WL 13261995, at *3 (N.D. Cal. June 27, 2011). "Related goods are those
27 products which would be reasonably thought by the buying public to come from the same
28 source if sold under the same mark." *Adidas America, Inc. v. Skechers USA, Inc.*, 890 F.3d 747

1 at 755. “In practice, this definition does not necessarily require a close proximity before goods
2 will be found related.” *Brooklyn Brewery Corp. v. Black Ops Brewing, Inc.*, 156 F. Supp. 3d
3 1173, 1183 (E.D. Cal. 2016) (citation omitted).

4 Here, Impossible Foods offers a wide assortment of edible meat alternatives that
5 consumers can purchase on Amazon.com and in grocery stores. Flemming Decl. Exs. CC, DD.
6 Defendants offer edible sleep and energy powders (the “Powders”) that consumers can
7 purchase on Amazon.com and through Defendants’ websites. Dkt. Nos. 138-3, 138-4, 138-7 at
8 19–24. Even in the preliminary injunction context, where the burden is on the *movant*, courts
9 have found similar products to be related. *See, e.g., Suja, Life, LLC v. Pines Int’l, Inc.*, No. 16-
10 CV-985-GPC(WVG), 2016 WL 6157950, at *7 (S.D. Cal. Oct. 24, 2016) (juice products and
11 “nutritional supplements sold in powder and capsule form” were “somewhat related”); *Hansen*
12 *Bev. Co. v. Cytosport, Inc.*, No. CV 09-0031-VBF(AGR), 2009 WL 5104260, at *12 (C.D.
13 Cal. Nov. 4, 2009) (energy drinks and protein shakes were “‘related’ in the minds of the
14 consumer”).

15 The fact that other well-known companies sell both types of products shows that
16 consumers might reasonably believe the parties’ products come from the same company. *See*
17 *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (“[T]estimony that third-
18 party companies sell both types of goods is pertinent to the relatedness of the goods.”). For
19 example, Quest Nutrition sells “meatlovers” pizza and protein powders. Declaration of Bruce
20 Nelson Exs. A–D. Clif Bar sells plant-based protein bars and electrolyte powders. *Id.* at Exs.
21 E–H. And Hormel sells plant-based meat products and plant-based protein shakes. *Id.* at Exs. I–
22 L. If such well-known companies have offered both meats and other high-protein foods, as well
23 as nutritional supplements and powders, then consumers might reasonably believe that
24 IMPOSSIBLE-branded meat substitutes and IMPOSSIBLE-branded sleep and energy Powders
25 are sold by the same company. *See San Miguel Pure Foods Co. v. Ramar Int’l Corp.*, No. CV
26 11-09747 RGK(FMOx), 2012 WL 13227045, at *6 (C.D. Cal. Nov. 27, 2012) (“While the
27 relatedness between the products is not as strong, other courts have found a likelihood of
28 confusion in seemingly unrelated food items, such as ice cream and flour, deli meats and beer,

1 bakery products and frozen chicken.”).

2 4. **The Parties Are Likely to Expand to Compete More Directly**

3 Even if Defendants could prove that *no consumer* would believe the parties’ products
4 are related, confusion is still likely when, *inter alia*, “either or both parties might expand their
5 offered products . . . to overlap.” *Interstellar Starship*, 184 F.3d at 1111. [REDACTED]

6 [REDACTED]

7 [REDACTED] Flemming Decl. Exs. S, T, U, V; *id. at*
8 Ex. B (Runyon Apr. 10 Dep.) at 348:13–16, 349:16–19. “In the end, it is for the jury to decide
9 whether the parties really intend to expand into—or are already operating in—the same product
10 line or lines.” *Rearden LLC*, 683 F.3d at 1219. But for summary judgment purposes, this factor
11 weighs in favor of a likelihood of confusion because the parties “might expand their offered
12 products . . . to overlap.” *See Interstellar Starship*, 184 F.3d at 1111.

13 5. **The Parties Use Similar Marketing Channels**

14 “Here, both companies market their products using social media, both . . . sell their
15 products online, and both sell their products on Amazon,” though Impossible Foods also sells
16 its products in restaurants and “grocery stores,” and Defendants sell theirs on their “own
17 website.” *See Blue Bottle Coffee*, 2024 WL 2061259, at *14; *see also* Flemming Decl. Exs. CC,
18 DD, EE, FF; Dkt. Nos. 138-3, 138-4, 138-7 at 19-24. In such circumstances, “the marketing
19 channels are similar” for summary judgment purposes, “and this factor favors [confusion].”
20 *Blue Bottle Coffee*, 2024 WL 2061259, at *15.

21 6. **The Intent Factor Favors Impossible Foods**

22 Defendants were aware of Impossible Foods and its marks prior to offering the
23 Powders. *Compare* Flemming Decl. Exs. W [REDACTED]
24 [REDACTED], BB (November 10, 2020 demand
25 letter from Impossible LLC to Impossible Foods *with* Dkt. 138-3 at 5 (date first available
26 August 20, 2022), Dkt. 138-7 at 12 (showing Impossible Sleep as “Coming Soon” on January
27 7, 2022). At summary judgment, this factor “favors the plaintiff ‘where the alleged infringer
28 adopted his mark with knowledge, actual or constructive, that it was another’s trademark.’” *JL*
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1 *Bev. Co.*, 828 F.3d at 1111 (citation omitted). Defendants allege that they expanded into
2 offering the Powders in good faith, but “although the relative weight of permissible and
3 impermissible motives may emerge at trial, we must be careful about untangling them at
4 summary judgment, where we must draw all reasonable inferences in [the non-movant’s]
5 favor.” *Yuga Labs*, 144 F.4th at 1173. Under binding precedent, this factor weighs strongly in
6 Impossible Foods’s favor at summary judgment.

7 **7. Consumers Do Not Exercise a High Degree of Care**

8 “Obviously, the price level of the goods . . . is an important factor in determining the
9 amount of care the reasonably prudent buyer will use.” 3 *McCarthy, supra*, § 23:95. Further,
10 “[p]urchasers of relatively inexpensive goods such as ordinary grocery store foods are held to a
11 lesser standard of purchasing care.” *Id.* Here, the Powders retail for between \$39 and \$49, and
12 Impossible Foods’s products retail for between \$7 and \$11 per pound. Dkt. No. 138-7 at 19–20;
13 Flemming Decl. Exs. CC, DD. Thus, this factor weighs in favor of a likelihood of confusion.

14 **8. The Absence of Actual Confusion Is Understandable**

15 “[T]his factor is weighed heavily only when there is evidence of past confusion or,
16 perhaps, when the particular circumstances indicate such evidence should have been available.”
17 *Ironhawk*, 2 F.4th at 1165. [REDACTED]
18 Flemming Decl. at Ex. X. It is no surprise that among such a small number of customers, none
19 of them formally documented and sent any evidence of their confusion to the parties.
20 Flemming Decl. Ex. B (Runyon Apr. 10 Dep.) at 256:17–261:6; 261:12–262:18. This factor is
21 therefore neutral.

22 In sum, at least **five** *Sleekcraft* factors weigh heavily in Impossible Foods’s favor: (1)
23 strength of the mark; (2) similarity of the marks; (3) likelihood of expansion; (4) similarity of
24 the marketing channels; and (5) intent. The other three factors either weigh in Impossible
25 Foods’s favor or are neutral. Thus, a likelihood of confusion exists. And even if the Court
26 determines that “conflicting facts render it unclear whether a likelihood of confusion exists,
27 summary judgment is inappropriate,” and Defendants’ motion must still be denied. *See*
28 *Ironhawk*, 2 F.4th at 1161–62.

1 **C. Defendants Misconstrue the Elements of California Common Law Unfair
2 Competition Claims**

3 Defendants devote six pages of their brief to what they deem the unique “elements” of
4 California common law unfair competition claims. But “[t]his Circuit has consistently held that
5 state common law claims of unfair competition . . . are ‘substantially congruent’ to claims
6 made under the Lanham Act.” *Cleary v. News Corp.*, 30 F.3d 1255, 1263–63 (9th Cir. 1994)
7 (citation omitted). This Court has also held that “[t]he elements of California state common law
8 claims of unfair competition . . . are substantially congruent to claims made under the Lanham
9 Act.” *Iglesia Ni Cristo v. Cayabyab*, No. 18-cv-00561-BLF, 2019 WL 3997474, at *12 (N.D.
10 Cal. Aug. 23, 2019) (Freeman, J.) (citation omitted).

11 To prevail on an unfair competition claim under the Lanham Act, the claimant must
12 prove: “(1) ownership of a valid mark (i.e., a protectable interest), and (2) that the alleged
13 infringer’s use of the mark is likely to cause confusion, or to cause mistake, or to deceive
14 consumers.” *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006); *see also Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1134 (N.D. Cal. 2014)
15 (analyzing Lanham Act and California common law claims together at summary judgment
16 because they are “substantially congruent”). Defendants do not challenge Impossible Foods’s
17 ownership of any of its asserted marks, and as discussed above, a genuine dispute exists as to
18 whether Defendants’ conduct is creating a likelihood of consumer confusion.

19 Defendants contend that Impossible Foods must separately prove “passing off,” and
20 Defendants therefore analyze causes of action for passing off and raise issues of scienter. But
21 the Ninth Circuit has held—in a case deceptively quoted by Defendants—that common law
22 unfair competition may be proven by “acts *analogous* to ‘passing off,’ *such as the sale of*
23 *confusingly similar products.*” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1147
24 (9th Cir. 1997) (emphasis added). Again, Impossible Foods has already shown a genuine
25 dispute as to whether the Powders are “confusingly similar.”

26 Defendants similarly contend that Impossible Foods must prove a separate “competitive
27 injury,” but under California law, if there is a “likelihood of confusion,” “then injury has
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1 occurred.” *Ball v. Am. Trial Laws. Ass’n.*, 14 Cal. App. 3d 289, 304, 92 Cal. Rptr. 228, 238 (Ct. 2 App. 1971). This is why the Ninth Circuit has “consistently held” that such California claims 3 are “substantially congruent” with Lanham Act claims: if ownership and likelihood of 4 confusion are established, then the elements for both types of claims are established.

5 **D. Impossible LLC Fails to Establish Priority As a Matter of Law**

6 The most troubling aspect of Defendants’ motion is Impossible LLC’s request that the 7 Court rule as a matter of law that it has “priority” in “the category” (singular) of “fitness, 8 health, recipes, cookbooks, and nutrition advisory services.” Br. at 22. This is a sleight of hand 9 that warrants some explanation and context.

10 Impossible LLC is not challenging Impossible Foods’s “core[] offerings,” i.e., 11 “artificial meat products.” Dkt. No. 241 at 65 ¶ 44. Instead, Impossible LLC is challenging only 12 a narrow subset of goods and services: (1) a cookbook, a “Recipes” webpage, and “recipe 13 services” provided at “endurance athletic events”; (2) “apparel”; and (3) “philanthropy” 14 (collectively, the “Accused Products”). *Id.* ¶¶ 50–55. Defendants likely realize that a potential 15 injunction against these non-“core” products does not give them much leverage, so they appear 16 to be trying to expand the scope of their claims beyond what is in their pleading.

17 Part of this effort is to obtain a ruling at summary judgment that Impossible LLC has 18 “priority” over Impossible Foods in the broad “category” of “fitness, health, recipes, 19 cookbooks, and nutrition advisory services.” Br. at 22. Indeed, Impossible LLC has grouped 20 these disparate fields into a single defined term, hoping the Court will adopt it: the deceptively 21 named “Diet and Nutrition Category.” *Id.* Then, if Impossible LLC prevails on its infringement 22 claims at trial, it will seek to enjoin Impossible Foods from using the word “Impossible” in 23 connection with “health,” “fitness,” “nutrition,” and other nebulous, sweeping categories. In 24 other words, Impossible LLC is pursuing an indirect (and legally impermissible) attack on 25 Impossible Foods’s “core” products and how it advertises them—e.g., as “a healthy 26 alternative” or “nutritious” or “good for athletes.”

27 Considering this context, the Court should deny Impossible LLC’s motion for at least 28 three reasons. *First*, Impossible LLC fails to identify any particular mark for which it claims

1 priority. Indeed, Impossible LLC’s evidence (particularly its financial evidence) is not tied to
2 any particular mark. *Second*, to the extent Impossible LLC enjoys any trademark rights in any
3 particular mark in connection with the broad fields claimed, those rights are in very specific
4 goods and services. *Third*, even as to those specific goods and services, Impossible LLC fails to
5 prove both prior and continuous use in commerce as a matter of law, which are required to
6 establish priority.

7 **1. Impossible LLC Fails to Tie Its Evidence to Any Specific Mark**

8 Even though Impossible LLC bears the burden of proof on its summary judgment
9 motion, it fails to identify any particular mark for which it is claiming priority. Impossible LLC
10 asserts at least *eleven* marks in this action, but it fails to tie any of its record evidence of
11 priority to any particular mark. Dkt. No. 241 at 63, ¶ 36. This failure dooms Impossible LLC’s
12 motion because there is a clear “dispute” as to whether any of Impossible LLC’s evidence
13 shows priority in *any one* of its asserted marks. *See Am. Auto. Ass’n of N. Cal., Nev. & Utah v.*
14 *Gen. Motors LLC*, 367 F. Supp. 3d 1072, 1090 (N.D. Cal. 2019) (denying summary judgment
15 on priority because evidence of “sales numbers and revenue” could not be tied to the specific
16 mark asserted); *AM Participations S.A.S. v. Div. 7, LLC*, No. CV 20-7633 PSG (JPRx), 2021
17 WL 6104388, at *7 (C.D. Cal. Oct. 13, 2021) (denying summary judgment on the “highly fact-
18 specific totality of the circumstances inquiry” of priority because of “conflicting evidence”
19 over whether evidence of use was tied to specific mark asserted).

20 **2. Impossible LLC Offers Very Limited Goods and Services**

21 Impossible LLC asserts priority in the “category” of “fitness, health, recipes,
22 cookbooks, and nutrition advisory services,” but Impossible LLC’s *actual offerings* (that
23 arguably fall within these broad fields) are far more limited. Under federal law, a trademark
24 cannot exist separately from the particular goods and services it identifies, meaning a company
25 cannot own trademark rights covering goods and services it does not offer. 3 *McCarthy, supra*,
26 § 24:11 (“One must designate for what goods the design is a trademark to avoid treating a
27 trademark as a right in gross.”).

28 Starting with “nutrition advisory services,” Mr. Runyon testified that Impossible LLC
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1 does not offer such services. Flemming Decl. Ex. B (Runyon Apr. 10 Dep.) at 61:22–62:1.
2 Thus, there is a genuine dispute over whether Impossible LLC has “priority” as to nutrition
3 advisory services, and that aspect of the motion must be denied.

4 As to “fitness,” Impossible LLC offers “a website featuring information relating to
5 excise and fitness,” Flemming Ex. E; in other words, a physical fitness blog. Impossible LLC
6 also offers online exercise programs under the marks Impossible Abs, Impossible Strength,
7 Impossible 5K, Impossible 10K, Impossible Half, Impossible Ultra, and Impossible
8 Marathon—none of which are asserted in this case. Flemming Decl. Ex. B (Runyon Apr. 10
9 Dep.) at 113:1–17. [REDACTED]

10 [REDACTED] Impossible LLC also offers its exercise
11 programs through an app called Impossible Fitness, but that use arose very recently and
12 therefore is irrelevant for priority purposes. *Id.* Ex. B (Runyon Apr. 10 Dep.) at 114:6–8. Thus,
13 for purposes of summary judgment, Impossible LLC’s offerings in the “fitness” field are
14 conscribed to (i) online exercise programs and (ii) a physical fitness blog—though it is unclear
15 what mark or marks are associated with those narrow offerings.

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] *Id.* Ex. B (Runyon Apr. 10 Dep.) at 243:15–244:4; 244:12–
20 15; Ex. C (Runyon May 15 Dep.) at 463:14–464:3.

21 Finally, Impossible LLC’s offerings in the categories of “recipes” and “cookbooks” are
22 similarly limited. Impossible LLC has never *published* any “recipes” or “cookbooks,” *id.* Ex. B
23 (Runyon Apr. 10 Dep.) at 63:15–19, [REDACTED]

24 [REDACTED]. *Id.* at 124:14–125:4. Thus, at most, Impossible LLC’s
25 offerings in these categories are limited to online recipes downloaded from Impossible LLC’s
26 website or from non-IMPOSSIBLE branded wellness apps.

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1 3. **Impossible LLC Fails to Prove Prior Use in Commerce as to**
2 **Nutrition Advisory Services and Online Recipes**

3 To establish priority, Impossible LLC must prove that it used its marks in commerce in
4 connection with each of those offerings *before* Impossible Foods's challenged use began. *See*
5 *Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir.), *as modified*, 97 F.3d
6 1460 (9th Cir. 1996) ("To acquire ownership of a trademark it is not enough to have invented
7 the mark first or even to have registered it first; the party claiming ownership must have been
8 the first to actually use the mark in the sale of goods or services."). Impossible Foods began
9 giving away IMPOSSIBLE-branded apparel swag in 2016. Flemming Decl. Ex. FF. And the
10 Impossible Foods cookbook was released in 2020. *Id.* Ex. GG. Under the Lanham Act, "use in
11 commerce" means

12 (1) on goods when—

13 (A) it is placed in any manner on the goods or their containers or the displays
14 associated therewith or on the tags or labels affixed thereto, or if the nature of
15 the goods makes such placement impracticable, then on documents associated
 with the goods or their sale, and

16 (B) the goods are sold or transported in commerce, and

17 (2) on services when it is used or displayed in the sale or advertising of services and the
18 services are rendered in commerce, or the services are rendered in more than one State
 or in the United States and a foreign country and the person rendering the services is
 engaged in commerce in connection with the services.

19 15 U.S.C. § 1127.

20 As discussed above, by its own 30(b)(6) witness's admission, Impossible LLC has
21 never offered "nutrition advisory services," Flemming Decl. Ex. B (Runyon Apr. 10 Dep.) at
22 61:22–62:1, so there is a dispute over whether Impossible LLC has "priority" in that category
23 as to any of its marks. It appears that Impossible LLC has been continuously offering exercise
24 programs and a physical fitness blog since before Impossible Foods adopted its IMPOSSIBLE
25 marks, but summary judgment as to those services is still improper because, as discussed
26 above, Impossible LLC failed to tie these offerings to any particular mark in its moving papers.

27 That leaves online recipes. To establish priority in online recipes, Impossible LLC
28 primarily relies upon products that do not bear any of its marks. [REDACTED]

~~REDACTED~~

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] Flemming Decl. Ex. C (Runyon May 15 Dep.) at 425:14–21. [REDACTED]
4 [REDACTED]
5 [REDACTED] *See id.* at
6 412:20–413:14; 414:11–415:1.
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] *See id.* Ex. C (Runyon May 15 Dep.)
10 at 428:13–19; 507:3–7. [REDACTED]
11 [REDACTED] *Id.* at 443:10–12; 517:13–17. [REDACTED]
12 [REDACTED]
13 [REDACTED] *Id.* at 429: 4–11.

14 Ultimately, Impossible LLC can base its priority claim in online recipes solely on two
15 physical exercise programs—i.e., the Impossible TRI guide and Impossible Abs program—
16 which happen to incorporate nutrition guides “designed to help athletes optimize their diets to
17 boost performance.” Dkt. No. 265-2 at 23. There is a genuine dispute over whether such use
18 qualifies as prior use in commerce (of a particular mark) in connection with online recipes.
19 [REDACTED]

20 [REDACTED] *See* Flemming Decl. Ex. C
21 (Runyon May 15 Dep.) at 418:6–12. And Impossible LLC’s motion references a single
22 purported cookbook entitled “The Impossible TRI Cookbook,” Dkt. No. 265-02 at 23, which
23 cannot serve as a trademark without proof of secondary meaning. *See Dr. Seuss Enters., L.P. v.*
24 *ComicMix LLC*, 300 F. Supp. 3d 1073, 1085 (S.D. Cal. 2017) (“While titles of single works are
25 not registrable, they may be protected under section 43(a) of the Lanham Act upon a showing
26 of secondary meaning.” (citation omitted)). [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED] . See, e.g., Flemming Decl. Ex. Y [REDACTED]
2 [REDACTED]
3 [REDACTED]

4 **4. Impossible LLC Fails to Prove Continuous Use as to Online Recipes**

5 To establish priority as to online recipes, Impossible LLC must also prove that it has
6 used its marks *continuously* in connection with those specific services. “To be a continuing use,
7 the use must be maintained without interruption.” *Casual Corner Assocs., Inc. v. Casual Stores*
8 *of Nev., Inc.*, 493 F.2d 709, 712 (9th Cir. 1974). Sporadic uses—those that are “casual” or to
9 which “little importance [is] apparently attached”—are insufficient to establish priority. *Dep’t*
10 *of Parks & Rec. v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1126 (9th Cir. 2006) (citation
11 omitted). “[N]o goodwill is created when a mark is ‘seen by the consuming public only in very
12 limited quantity.’” *Sebastian Brown Prods. LLC v. Muzooka Inc.*, No. 15-CV-01720-LHK,
13 2016 WL 5910817, at *9 (N.D. Cal. Oct. 11, 2016) (citation omitted).

14 Here, Impossible LLC fails to prove the absence of a genuine dispute as to its alleged
15 continuous use of any particular IMPOSSIBLE-formative mark for online recipes. Impossible
16 LLC cites sales revenue from third-party “affiliate” products and its meal plans and apps, but as
17 discussed, Impossible LLC has not shown that any of those offerings bear an IMPOSSIBLE-
18 formative mark. *See Matrix Motor Co. v. Toyota Motor Sales, U.S.A., Inc.*, 120 F. App’x. 30,
19 31 (9th Cir. 2005) (no priority where mark was not “visible to the public” and did not create
20 association between mark and the offerings); *see also Brookfield Commc’ns Inc. v. West Coast*
21 *Ent. Corp.*, 174 F.3d 1036, 1052 (9th Cir. 1999) (holding that use in commerce must “identify
22 or distinguish the marked goods in an appropriate segment of the public mind as those of the
23 adopter of the mark”). [REDACTED]

24 [REDACTED]
25 [REDACTED] Flemming Decl. Ex. B (Runyon Apr. 10 Dep.) at
26 327:7–328:16; 329:10–22; 337:4–345:15. At a minimum, there is a genuine dispute of material
27 fact as to the extent and nature of Impossible LLC’s actual use as well as continuous use of the
28 IMPOSSIBLE-formative marks in connection with online recipes. Thus, summary judgment

1 must be denied.

2 **E. Impossible LLC Abandoned Three of its Registered Marks**

3 Finally, Impossible LLC requests summary judgment on Impossible Foods's claim that
4 Impossible LLC abandoned its registered IMPOSSIBLE FITNESS word and design marks and
5 IMPOSSIBLE motion mark (Reg. Nos. 5590801, 5603025, and 6571603). The Court should
6 deny Impossible LLC's request.

7 As a preliminary matter, Impossible LLC appears to have confused its IMPOSSIBLE
8 static design mark registration with its IMPOSSIBLE animated motion mark registration.
9 Registration No. 6571603 covers an animated "motion mark," with the word IMPOSSIBLE
10 and "a shaded band that moves horizontally from the left through the middle." Dkt. 151-38 at
11 5. Impossible LLC submitted evidence of use of its static *design* mark in connection with t-
12 shirts, but no evidence of the use of its animated *motion* mark. Dkt. No. 262-9 at 4-5.

13 Furthermore, Impossible LLC has already admitted that it has never offered many of the
14 goods covered by the motion mark registration (i.e., "sweatshirts, pants, shorts, tank t[o]ps,
15 yoga pants, tights and underwear." Flemming Decl. B (Runyon Apr. 10 Dep.) at 131:2-3;
16 133:11-16; 133:18-134:4; 166:17-169:3; 201:4-202:8. And the record contains no evidence of
17 use of the motion mark in connection with any of the other goods and services listed in the
18 registration, for at least three years. Flemming Decl. Ex. H. Thus, Impossible LLC completely
19 fails to carry its summary judgment burden as to the motion mark registration. Indeed,
20 Impossible Foods specifically requested "representative examples of Impossible LLC's
21 Advertisements featuring each of the Impossible LLC Goods and Services under each
22 IMPOSSIBLE-formative Mark," seeking any documentation of use of the motion mark and all
23 other marks. *Id.* Ex. G. Impossible LLC produced none as to the motion mark. *Id.* ¶ 3; *see also*
24 *eMachines, Inc. v. Ready Access Memory, Inc.*, No. EDCV00-00374-VAPEEX, 2001 WL
25 456404, at *5 (C.D. Cal. Mar. 5, 2001) ("Once the presumption of nonuse is triggered [from
26 three years of nonuse], the burden shifts to the mark's owner to produce evidence of either
27 actual use during the period in question or intent to resume use."); *see also Coca-Cola Co. v.*
28 *Overland, Inc.*, 692 F.2d 1250, 1254 (9th Cir. 1982) ("A party moving for summary judgment

~~REDACTED~~

1 is entitled to the benefit of any relevant presumptions that support the motion.”).

2 As to the IMPOSSIBLE FITNESS word and design mark registrations, Impossible LLC
3 failed to submit evidence of the use of those marks in connection with “t-shirts and tank tops”
4 (the only goods claimed in the registrations after Impossible LLC’s recent PTO filings).
5 Impossible LLC directs the Court to Exhibits G and N, but neither shows use of the two
6 IMPOSSIBLE FITNESS marks in connection with any goods or services, much less T-shirts or
7 tank tops. Dkt. Nos. 262-9, 262-16. Impossible LLC also directs the Court to Mr. Runyon’s
8 deposition testimony, but there, he merely states that the IMPOSSIBLE FITNESS design mark
9 appears on the ImpossibleFitness.com website, where t-shirts are sold. Dkt. No. 262-4 (Runyon
10 Apr. 10 Dep.) at 144:5–145:9. That testimony was false, as no apparel is sold on
11 ImpossibleFitness.com. Flemming Decl. Ex. Z (showing no menu items for shop or apparel).
12 Indeed, the IMPOSSIBLE FITNESS marks are nowhere to be found on the Impossible LLC
13 webpages that sell apparel. *See, e.g., id.* Ex. AA.

14 Defendants moved for summary judgment on the issue of abandonment, but the
15 summary judgment record shows no use of the IMPOSSIBLE FITNESS word and design
16 marks in connection with “t-shirts and tank tops” for at least three years. *Id.* ¶ 3. For this simple
17 reason, summary judgment on Impossible Foods’s abandonment claim must be denied.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Defendants’ motion should be denied in its entirety.

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1 DATED: August 29, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2025, the foregoing document was filed electronically using the Court's CM/ECF system, which will send notification of such filing to counsel of record.

/s/ H. Forrest Flemming, III
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